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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JOHN RUSSELL HICKS,

Defendant and Appellant.

D037117

(Super. Ct. No. SF136352)

APPEAL from a judgment of the Superior Court of San Diego County, Federico Castro, Judge. Affirmed.

A court determined John Hicks to be a sexually violent predator within the meaning of the Sexually Violent Predators Act (the Act) (Welf. & Inst. Code, § 6600 et seq.)¹ and committed him to the State Department of Mental Health (Department) for

¹ The Act defines a sexually violent predator as "a person who has been convicted of a sexually violent offense against two or more victims and who has a diagnosed mental disorder[] that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior." (Welf. & Inst.

two years. On appeal Hicks contends substantive due process requires a finding that he cannot control his dangerous behavior before he can be committed as a sexually violent offender and, although the trial court made such a finding in his case, it was not supported by substantial evidence.

Because the trial court here made the specific finding requested by Hicks, we need not decide whether substantive due process requires a specific finding of the defendant's inability to control his or her dangerous behavior as a necessary element of sexually violent predator status under the Act. Assuming, without deciding, such a finding is required, we conclude the court's express finding that Hicks was unable to control his dangerous behavior is supported by substantial evidence. Accordingly, we affirm.

BACKGROUND

In June 2000, the People filed a petition to commit Hicks as a sexually violent predator, alleging Hicks had (1) in May 1977 been convicted of two counts of committing lewd and lascivious acts upon a child under the age of 14 (Pen. Code, § 288); (2) in January 1982 been convicted in Oregon of committing sexual abuse in the first degree on a child under the age of 12 and sodomy in the first degree on a child under the age of 12; and (3) in April 1999 pleaded guilty to committing the crime of employment of a minor to perform prohibited acts (Pen. Code, § 311.4, subd. (c)). The matter proceeded

Code, § 6600, subd. (a)(1).) The requisite mental disorder is defined by the Act as including a "congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to the commission of criminal sexual acts in a degree constituting the person a menace to the health and safety of others." (Welf. & Inst. Code, § 6600, subd. (c)).

to a bench trial. The People presented testimony from licensed psychologist Charles Jackson and licensed clinical psychologist Christopher North, who each had reviewed Hicks's clinical records, probation and police reports, interviewed Hicks in person, and evaluated him to determine whether he met the Act's criteria for a sexually violent predator. Hicks testified on his own behalf, essentially attributing his conduct to alcohol but also denying that his conduct towards children amounted to molestation.

The court determined that Hicks had been convicted of four sexually violent offenses against two or more victims and had a diagnosed mental disorder, namely pedophilia. It found Hicks's pedophilia makes him a danger to the health and safety of others in that he is likely to engage in sexually violent conduct if released. Further, although it questioned the legal necessity of such a finding, the court specifically found Hicks was "unable to control his dangerous behavior." The court granted the People's petition and ordered Hicks be committed for a second two-year term to the Department.

DISCUSSION

Hicks contends that in order to sustain a commitment under the Act, substantive due process requires the People to prove beyond a reasonable doubt that the individual is "volitionally impaired and cannot control his dangerous behavior." He specifically relies on the following isolated language from the California Supreme Court in *Hubbart v. Superior Court* (1999) 19 Cal.4th 1138: "[D]ue process *requires* an inability to control dangerous conduct, and does not restrict the manner in which the underlying impairment is statutorily defined." (*Id.* at p. 1158, emphasis by the court.) The People argue the

alleged sexually violent predator's inability to control his behavior is not an "element" of the Act.

We need not reach the issue of whether the Act violates Hicks's substantive due process rights absent a finding he is unable to control his behavior, because the trial court expressly made such a finding in his case. It suffices here to hold (1) the court's finding was supported by substantial evidence from the testimony of Drs. Jackson and North; and (2) that evidence amounted to sufficient "proof of serious difficulty in controlling behavior" to meet the standard set out by the United States Supreme Court in *Kansas v. Crane* (2002) ____ U.S. ____ [2002 WL 75609].

When we conduct a review for substantial evidence, " '[t]he critical inquiry . . . [is] . . . whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt. . . . [T]his inquiry does not require a court to "ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt." [Citation.] Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' An identical standard applies under the California Constitution. [Citation.] 'In determining whether a reasonable trier of fact could have found defendant guilty beyond a reasonable doubt, the appellate court "must view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier [of fact] could reasonably deduce from the evidence." ' [Citation.]" (*People v. Staten* (2000) 24 Cal.4th 434, 460, quoting *Jackson v. Virginia* (1979) 443 U.S. 307, 318-319 & *People v. Johnson* (1980) 26 Cal.3d

557, 576.) Under this test we do not reweigh the evidence; the credibility of witnesses and the weight to be accorded the evidence are matters exclusively within the province of the trier of fact. (*People v. McCleod* (1997) 55 Cal.App.4th 1205, 1221, citing Evid. Code, § 312.)

Hicks specifically challenges the conclusions of the People's expert psychiatrists, arguing their testimony in general established the opposite of the court's finding -- that absent the presence of small children and alcohol, Hicks had the ability to control his behavior and had demonstrated his ability to do so in the past. Hicks further points out that Dr. Jackson agreed there is no peer-reviewed literature supporting certain conduct (prior acts and lack of insight) as a "diagnosis" for volitional impairment; that both experts testified Hicks's volition was not "totally impaired"; and that Dr. North in particular felt a person's unwillingness to control their behavior, rather than volitional inability, would suffice to commit one as a sexually violent predator under the Act. As we explain, the record does not support Hicks's characterization of the experts' testimony as contradicting the court's finding. Further, to the extent Hicks suggests the experts' testimony regarding volitional impairment is not supported by sound reasoning or sufficient factual data (i.e., peer reviewed literature), we likewise reject that contention.

At trial, Dr. Jackson testified he had concluded Hicks was presently unable to control his behavior, and was unable to control his behavior at the time he committed his prior offenses, involving fondling, orally copulating, and attempting to anally penetrate

children Hicks had been babysitting, and photographing the genitalia of female toddlers.² During his direct examination, the prosecutor asked Dr. Jackson how Hicks's pedophilia affected his emotional or volitional capacity. Dr. Jackson explained that Hicks's (1) lack of remorse; (2) lack of insight into his problematic behavior; and (3) continued and repeated sexual offenses regardless of his past incarceration or the possibility of future incarceration demonstrated to him that Hicks's "volition is impaired" that he is "unable to control those underlying sexual urges." Dr. Jackson further explained, in response to the court's inquiry, that Hicks's volition was affected by external variables; that when children were not present, as in a prison setting or the courtroom, Hicks would not commit sexual offenses.³

² Hicks does not challenge the sufficiency of the evidence supporting the court's findings he suffered four qualifying prior convictions and has been diagnosed with pedophilia. We need not set out the details of those prior offenses or the testimony regarding his pedophilia diagnosis.

³ Specifically, Dr. Jackson testified:

"[Dr. Jackson]: The fact that he's continued to engage in these [sic] behavior, two things: One is lack of remorse. Absolutely no remorse. A person has no remorse, they don't have negative emotions about that, so they're not motivated to change. And number two, if they have no insight into their behavior, they don't realize they have a problem. Then, of course, they're not motivated to change. [¶] Additionally, when a person engages in repeated sex offenses, inspite [sic] of the consequences, he was arrested in '73 for sex offense, that was dismissed; '77, got a conviction, spent time in prison, got out, committed another one in '82, got out, another one in '92, and '93 and then another one in '99. That demonstrates to me that his volition is impaired; he's unable to control those underlying sexual urges.

"[Prosecutor]: And --

"[The court]: Could I ask him a quick question? You said his volition is impaired?

"[Dr. Jackson]: That's correct.

"[The court]: So he's unable to control his behavior?

Additionally, during his cross-examination, Dr. Jackson testified that Hicks was unable to control his behavior at the time he committed the predicate offense in 1977 as evidenced by the fact Hicks, an intelligent man who knew his conduct was unlawful and he would risk additional prison time, continued to offend after having just been investigated for sexual abuse of his own children. Dr. Jackson reached a similar conclusion with regard to Hicks's 1982 offense.

Dr. Jackson explained how a person who repeatedly molests by choice, as opposed to by his or her inability to control molesting behavior, nevertheless exhibits volitional impairment as required by the Act. According to Dr. Jackson, a person who consciously chooses to molest children suffers from an emotional impairment. When such a person cannot control those emotions or urges, they demonstrate a volitional impairment -- an inability to control those emotions:

"[Defense counsel]: Okay. So what -- what facts do you look at to distinguish whether a person's acts, in this case specifically sexual molest of a child, is due to the fact that they wanted to molest that child and they simply did it as opposed to having to molest that child because they couldn't control their urges to do so?

"[Dr. Jackson]: That's correct. I need to qualify that. That doesn't mean that it is impaired all the time. It's when the situation arises. Mr. Hicks' [sic] controlled by external variables. For example, when in prison there are no children, so he can't commit the crime [sic]. Here in the courtroom he's perfectly capable of controlling himself, but when he's placed in a situation around small children, then those sexual urges surface and he's unable to control those urges, even in spite of the fact that he's been incarcerated at least four different times for the same behavior."

"[Dr. Jackson]: I think it's a combination. And the statute says emotional or volitional impairment, so if the person just simply chooses to molest children, then I think that his emotions are impaired. When the person is unable to control those urges, inspite [sic] of repeated incarceration, then I think that demonstrates volitional impairment, control of that emotion."

Dr. North's opinion differed slightly from that of Dr. Jackson, in that Dr. North saw a distinction between emotional and volitional impairment, although he found evidence of both causing Hicks's inability to control his behavior. He testified that Hicks's pedophilia affected his volitional and emotional capacity in such a matter that Hicks was "consumed" with sexual interest in children to a degree that for the past 30 years it was the driving force in his life. He pointed out that Hick's pedophilia caused him to put himself around children and work in places where children were present, i.e., "grade schools, headstart, a pediatric unit . . . offering to babysit children" Dr. North testified the disorder resulted in deficits in Hicks's volitional capacity in that it caused him to be arrested and convicted of sexual offenses on numerous occasions, and resulted in deficits in his emotional capacity in that it caused him to rationalize his conduct and be insensitive to how his actions affected his victims. Dr. North found Hicks's pedophilia rendered him unable to control his behavior, stating: "Well, it's much like an alcoholic who doesn't have control over his drinking. An alcoholic can choose what he drinks, when he drinks, and where he drinks, but he doesn't really have control over the drinking per se. Mr. Hicks may choose who he molests, when he molests and where he molests, but he doesn't really have control over his sexual impulses per se. They're consuming.

He's preoccupied with them. He has had difficulty managing them over the years. I think its fair to say that he really doesn't have good control over his pedophilic interests."

On January 22, 2002, the U.S. Supreme Court decided *Kansas v. Crane* (2002) ____ U.S. ____, in which it held its decision in *Kansas v. Hendricks* (1997) 521 U.S. 346 (*Hendricks*) set forth no requirement that the state prove a dangerous individual has a total or complete lack of control over his behavior, but nevertheless the Constitution did require some "proof of serious difficulty in controlling behavior." (*Kansas v. Crane*, ____ U.S. at p. ____.) The court "recognize[d] that in cases where lack of control is at issue, 'inability to control behavior' will not be demonstrable with mathematical precision." (*Ibid.*) It explained, "[T]he Constitution's safeguards of human liberty in the area of mental illness and the law are not always best enforced through precise bright-line rules. For one thing, the States retain considerable leeway in defining the mental abnormalities and personality disorders that make an individual eligible for commitment. [Citation.] For another, the science of psychiatry, which informs but does not control ultimate legal determinations, is an ever-advancing science, whose distinctions do not seek precisely to mirror those of the law. [Citations.] Consequently, we have sought to provide constitutional guidance in this area by proceeding deliberately and contextually, elaborating generally stated constitutional standards and objectives as specific circumstances require." (*Id.* at p. ____.)

In the present case, the testimony recited above allows a rational trier of fact to find beyond a reasonable doubt that Hicks is volitionally impaired to such an extent that he has serious difficulty in controlling his dangerous behavior -- all that is required under

Kansas v. Crane. Contrary to Hicks's argument, Dr. Jackson did not testify that Hick's volitional impairment was "situational" in the sense that Hicks could control his behavior if he chose to do so. The doctor's testimony made clear that Hicks's volitional impairment causing him to repeatedly offend was controllable only by external factors, such as incarceration. Dr. Jackson's point was essentially that Hicks could "control" his offensive behavior towards children when he was placed in a setting where it was impossible for him to commit such acts. The fact Dr. North testified as to emotional incapacity ("unwillingness" to control behavior) as a factor independent from volitional capacity does not defeat our conclusion. Assuming due process requires a finding of volitional as opposed to emotional impairment, an issue the court did not reach in *Kansas v. Crane* (___ U.S. at p. ___), the court could have reasonably adopted Dr. Jackson's theory -- that a person who cannot control their emotions or urges is volitionally impaired -- to in any event rely upon Dr. North's testimony in support of its finding.

Hicks points to his periods of probation, alcoholism and his confinement to a wheelchair as evidence demonstrating he can control his behavior, defeating the experts' testimony otherwise. At best, such matters create an evidentiary conflict that does not necessarily invalidate the substantial evidence presented through the experts' opinions and conclusions. But Dr. North minimized those factors; he explained that although alcohol had "been a factor" in Hicks's offenses and increases the risk for sexual reoffense, he felt, based upon his history, Hicks probably could not control his drinking. The court was entitled to, and indeed did, reject Hicks's self-serving testimony that he did not intend to drink due to his medical condition. Thus, Hick's alcohol consumption, to the

extent it is another behavior he cannot control, would not affect the conclusion that his pedophilia renders him unable to control his behavior. Further, Dr. North testified Hicks's wheelchair confinement did not change his conclusions because Hicks was still capable of luring children into his home or having them around him as he had arranged in the past. Neither expert stated that Hicks demonstrated any degree of control over his behavior during his periods of probation; the sole reference to Hick's probation record is a 1999 probation officer's report which indicates that Hicks "does not appear to have the ability to comply with conditions of probation as shown by his apparent failure to register [as a sex offender] and his claiming to live in Mexico, so he won't have to do so." These matters provide no basis to reject the experts' conclusions as substantial support for the court's finding.

In reaching our conclusion, we acknowledge that the value of expert opinion evidence depends on the factors considered and the reasoning employed. For example, where an expert bases his or her "conclusion upon assumptions which are not supported by the record, upon matters which are not reasonably relied upon by other experts, or upon factors which are speculative, remote or conjectural, then [the expert's] conclusion has no evidentiary value. [Citations.]" (*Pacific Gas & Electric Co. v. Zuckerman* (1987) 189 Cal.App.3d 1113, 1135.) Dr. Jackson and North's conclusions, however, were not simply unsupported speculation or conjecture; they were based upon external indicia of Hicks's behavior including Hicks's uncontested history of sexually abusing young children and their evaluation of Hicks's internal reaction to and understanding of his behavior. Hicks did not challenge their conclusions at trial as being without sufficient

qualification or foundation. And expert medical conclusions of this nature -- analogous to predictions of future dangerousness -- are not subject to any rule that they be based upon techniques or theories that are generally accepted in the scientific community. (See *People v. Ward* (1999) 71 Cal.App.4th 368, 373 [concluding expert psychological testimony involving predictions of future dangerousness are not subject to the admissibility rule of *People v. Kelly* (1976) 17 Cal.3d 24 and *Frye v. United States* (D.C. Cir. 1923) 293 Fed. 1013].) Accordingly, we disregard Hicks's attempt to use the lack of formal peer-reviewed literature as support for his substantial evidence argument. As the court stated in *People v. Ward*: "Both doctors had extensive experience in making psychological and psychiatric evaluations. Their expertise in diagnosis and treatment was closely related to the opinions they formed. Both doctors also applied accepted diagnostic techniques in reaching their conclusions. Whether they used clinical or actuarial models and whether they specifically followed the DMH handbook are not reasons to exclude their testimony. Even if a difference of opinion exists among professionals on these matters, the experts were not restricted to one methodology or another. To repeat the statement taken from [*People v. Stoll* (1989) 49 Cal.3d 1136, 1154], we cannot dictate the expert's journey into a patient's mind." (*People v. Ward*, at p. 374-375.) As stated, we conclude Dr. Jackson and North's testimony establishing met the requirements stated in *Kansas v. Crane* and was substantial evidence of the court's finding that Hicks was volitionally impaired such that he was unable to control his behavior.

DISPOSITION

The judgment is affirmed.

O'ROURKE, J.

WE CONCUR:

KREMER, P. J.

BENKE, J.